92-560

No.

Supreme Court, U.S.
FILED
SEP 28 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CITY OF MANHATTAN BEACH, et al.,
Petitioners,
vs.
PEGGY McMARTIN BUCKEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DEWITT W. CLINTON
County Counsel
ROGER H. GRANBO
Senior Deputy County Counsel

648 Hall of Administration
500 West Temple Street
Los Angeles, CA 90012
(213) 974-1900

Attorneys for Petitioners
COUNTY OF LOS ANGELES
and ROBERT PHILIBOSIAN

DAVID DUANE LAWRENCE
Counsel of Record
CAROL D. JANSSEN
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE

225 South Lake Avenue
Penthouse
Pasadena, CA 91101
(818) 304-7830

Attorneys for Petitioner
CITY OF MANHATTAN BEACH

(ADDITIONAL COUNSEL LISTED ON REVERSE SIDE.)

JOHN A. DALY
CHASE, ROTCHFORD,
DRUKKER & BOGUST

700 South Flower Street
Fifth Floor
Los Angeles, CA 90017
(213) 626-8711

Attorneys for Petitioners
COUNTY OF LOS ANGELES
and ROBERT PHILIBOSIAN

QUESTIONS PRESENTED

The opinion of the Court of Appeals for the Ninth Circuit concluded that a conspiracy to wrongfully prosecute which results in injury to the prosecuted party, ipso facto, constitutes a due process or equal protection violation thereby giving rise to a cognizable claim under 42 U.S.C. § 1983. Given the foregoing, the questions presented are:

1. Whether malicious prosecution constitutes a violation of due process for purposes of a § 1983 cause of action even where all procedural requirements of due process have been met.

2. Whether malicious prosecution constitutes a violation of equal protection for purposes of a § 1983 cause of action absent an allegation of discrimination against a member of a protected class.

3. Whether the state court's determination of probable cause at the preliminary hearing collaterally estops a malicious prosecution cause of action brought under § 1983.

LIST OF PARTIES

The parties before this court are Petitioners, City of Manhattan Beach, County of Los Angeles and Robert Philibosian and Respondent, Peggy McMartin Buckey.

Other defendants/appellees in the Ninth Circuit Court of Appeals proceeding include, Children's Institute International, Wayne T. Satz, Capital Cities/ABC. Inc., and Kathleen "Kee" MacFarlane.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED

LIST OF PARTIES

OPINIONS BELOW 1

JURISDICTION 2

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

ARGUMENT 10

I. A MERE ALLEGATION OF A WRONGFUL CONSPIRACY TO MALICIOUSLY PROSECUTE WHICH RESULTS IN INJURY TO PLAINTIFF DOES NOT CONSTITUTE A CONSTITUTIONAL VIOLATION FOR PURPOSES OF 42 U.S.C. § 1983 10

A. THE NINTH CIRCUIT'S SUBSTANTIVE DUE PROCESS APPROACH IS UNWORKABLE AND CONFLICTS WITH THE OPINIONS OF OTHER CIRCUITS 16

PAGE

II. THE NINTH CIRCUIT'S ERRONEOUS DECISION THAT PLAINTIFF COULD SUSTAIN A CLAIM PURSUANT TO § 1983 BASED ON A CONSPIRACY TO DEPRIVE PLAINTIFF OF HER EQUAL PROTECTION RIGHTS ABSENT A DISCRIMINATORY CLASSIFICATION IS IN CONFLICT WITH OTHER CIRCUITS AND THIS COURT . . 22

III. THE NINTH CIRCUIT'S FAILURE TO RECOGNIZE THAT PLAINTIFF'S CLAIM IS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL IS ERRONEOUS AND DIRECTLY CONFLICTS WITH THIS COURT'S AND OTHER CIRCUIT'S DECISIONS 27

CONCLUSION 37

APPENDIX A: Opinion, U.S. Court of Appeals for the Ninth Circuit, Filed February 19, 1992 . . . . A-1

APPENDIX B: Amended Opinion, U.S. Court of Appeals for the Ninth Circuit Filed July 1, 1992 . . . . B-1

APPENDIX C: Order, U.S. Central District Court of California: Dated September 28, 1990 . . . C-1

PAGE

APPENDIX D: Judgment, U.S. Court of Appeals for the Ninth Circuit, Filed July 1, 1992 . . . . D-1

APPENDIX E: Statutes and Constitutional Provisions Involved E-1

TABLE OF AUTHORITIES

CASES PAGES

Allen v. McCurry
449 U.S. 90, 101 S.Ct. 441
66 L.Ed.2d 308
(1980) 32, 35, 36

Baker v. McCollan
443 U.S. 137, 99 S.Ct. 2689
61 L.Ed.2d 433 (1979) . . . 10, 13

Barnier v. Szentmiklosi
810 F.2d 594
(6th Cir. 1987) 21

Bretz v. Kelman
773 F.2d 1026
(9th Cir. 1985) 8, 28

Brummett v. Camble
946 F.2d 1178 n.2
(5th Cir. 1991) 19

Bulkley v. Cline (1962)
206 Cal.App.2d 742 31

Campbell v. Brummett
___ U.S. ___
112 S.Ct. 2323
119 L.Ed.2d 241 (1992) . . . 14, 16

Carey v. City of Fall River
870 F.2d 40 (1st Cir. 1989) . . 29

Cerbone v. Conway
479 U.S. 84, 107 S.Ct. 390
93 L.Ed.2d 325 (1986) 14

TABLE OF AUTHORITIES
(Continued)

CASES PAGES

Coogan v. City of Wixom
820 F.2d 170
(6th Cir. 1987) 34, 36

Dowling v. City of Philadelphia
855 F.2d 136 (3d Cir. 1988). . . 30

Franco-DeJerez v. Burgos
876 F.2d 1038 (1st Cir. 1989). . 29

Friedman v. Village of Skokie
763 F.2d 236 (7th Cir. 1985) . . 17

Goodwin v. Metts
885 F.2d 157 (4th Cir. 1989) . . 18

Griffin v. Breckenridge
403 U.S. 88, 91 S.Ct. 1790
29 L.Ed.2d 338 (1971) . . . 24, 26

Guenther v. Holmgreen
738 F.2d 879
(7th Cir. 1984) 34, 35

Gunderson v. Schlueter
904 F.2d 407 (8th Cir. 1990) . . 21

Harris v. Harvey
605 F.2d 330 (7th Cir. 1979) . . 25

Henry v. Metropolitan
Sewer Dist.
922 F.2d 332
(6th Cir. 1990) 25

TABLE OF AUTHORITIES
(Continued)

CASES	PAGES
Hynson v. City of Chester Legal Dept. 864 F.2d 1026 (3d Cir. 1988)	24
Jaffe v. Stone 18 Cal.2d 146 114 P.2d 335 (1941)	33
Johnson v. Morel 876 F.2d 477 (5th Cir. 1989). .	25
Karim-Panahi v. Los Angeles Police Dept. 839 F.2d 621 (9th Cir. 1988). .	26
Lee v. Mihalich 847 F.2d 66 (3d. Cir. 1988). . .	17
Lorch v. Borough of Parkesburg, Pa. 736 F.2d 903 (3d Cir. 1984). . .	21
Mann v. City of Tucson, Dept. of Police 782 F.2d 790, (9th Cir. 1986). .	28
Parratt v. Taylor 451 U.S. 527, 101 S.Ct. 1908 68 L.Ed.2d 420 (1981)	29
Patterson v. New York 432 U.S. 197, 97 S.Ct. 2319 53 L.Ed.2d 281 (1977)	14

TABLE OF AUTHORITIES
(Continued)

CASES	PAGES
Phelps v. Witchita Eagle-Beacon 886 F.2d 1262 (10th Cir. 1989)	24
Rose v. Bartle 871 F.2d 331 (3d. Cir. 1989) . .	17
Singleton v. City of New York 632 F.2d 185 (2d Cir. 1980). . .	31
Torres v. Superintendent of the Police of Puerto Rico 893 F.2d 404 (1st Cir. 1990)	18, 20
Usher v. City of Los Angeles 828 F.2d 556, (9th Cir. 1987)	20, 26, 32
Washington v. Davis 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)	27
STATUTES:	
28 U.S.C. § 1331	4, 25
28 U.S.C. § 1332	4
28 U.S.C. § 1343	5
42 U.S.C. § 1983	Passim
42 U.S.C. § 1985(3)	Passim

TABLE OF AUTHORITIES
(Continued)

CASES	PAGES
MISCELLANEOUS:	
Federal Rule of Civil Procedure, Rule 12(b)(6)	5
U. S. Const. Amend. XIV	Passim

The City of Manhattan Beach, the County of Los Angeles, and Robert Philibosian hereby petition this Court for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case entered on July 1, 1992. Co-defendants Children's Institute International, Inc., Kathleen McFarlane, Capital Cities/ABC, Inc. and Wayne Satz have filed a separate petition for review of the Ninth Circuit's decision.

OPINIONS BELOW

The original and amended opinions of the United States Court of Appeals for the Ninth Circuit in Peggy McMartin Buckey v. County of Los Angeles, 957 F.2d 652, No. 90-56333, slip op. 1601 (9th Cir. February 19, 1992), amended

and reh'g denied, 968 F.2d 791, slip op. 7817 (9th Cir. July 1, 1992), are attached hereto as Appendices A and B, respectively.

JURISDICTION

On February 19, 1992 the United States Court of Appeals for the Ninth Circuit filed its decision in Peggy McMartin Buckey v. County of Los Angeles, No. 90-56333, slip op. 1601 (9th Cir. February 19, 1992). The City of Manhattan Beach, County of Los Angeles and Robert Philibosian filed timely petitions for rehearing and suggestions for rehearing en banc. Other defendants filed similar motions. The court denied the defendants' petitions for rehearing, rejected the suggestions for rehearing en banc and amended its opinion on July 1, 1992.

slip op. at 7817. This petition is timely pursuant to Sup. Ct. R. 13.4.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The text of 42 U.S.C. §§ 1983, and 1985(3) and the Fourteenth Amendment to the United States Constitution are set forth in the Appendix.

STATEMENT OF THE CASE

Respondent/Plaintiff, Peggy McMartin Buckey, was a teacher at the McMartin Pre-school in Manhattan Beach, California. She was indicted by the Los Angeles County Grand Jury in March of 1984, for the molestation of certain McMartin Pre-school children. An eighteen-month preliminary hearing was conducted at which numerous witnesses

testified and were cross-examined. In California, the purpose of a preliminary hearing is to determine whether probable cause exists to prosecute and to weed out unwarranted prosecutions which are inspired by malicious motives.

After hearing the evidence, the California Municipal Court found there was probable cause to believe Buckey had committed various acts of child molestation. Buckey and six co-defendants were bound over for trial. The District Attorney proceeded with a three-year, highly publicized trial. Buckey was acquitted and the criminal charges were dismissed.

In the instant action, the jurisdiction of the district court was invoked by plaintiff under 42 U.S.C. § 1983 and under 28 U.S.C. §§ 1331, 1332

and 1343. Plaintiff filed her Complaint January 19, 1990 and asserted the following causes of action against the City of Manhattan Beach, County of Los Angeles and Robert Philibosian:

1. Violation of Civil Rights under 42 U.S.C. § 1983;

2. Common law conspiracy

3. Defamation

Additionally, a supplemental state malicious prosecution cause of action was alleged against other defendants.

The district court granted defendants' motions to dismiss brought pursuant to Federal Rule of Civil Procedure, Rule 12(b)(6) on the basis the § 1983 claim was barred because probable cause had been previously determined by the eighteen month preliminary hearing that led to

plaintiff's being bound over for criminal trial. The supplemental state claims were dismissed without prejudice.

The United States Court of Appeals for the Ninth Circuit found Buckey's Complaint did not state a cognizable claim but reversed and remanded to permit plaintiff to amend the Complaint. Peggy McMartin Buckey v. County of Los Angeles, No. 90-5633, slip op. 1601, 1606 (9th Cir. February 19, 1992) (Appendix A). The court found the plaintiff could possibly state a cognizable claim under 42 U.S.C. § 1983 based upon a denial of equal protection and substantive due process. slip op. at 1607.

The court failed to address the contention that this malicious

prosecution action[1] is barred by the state criminal court's determination that probable cause existed to believe that plaintiff had committed the crimes for which she was charged.

Defendants filed Petitions for Rehearing and Suggestions for Rehearing en banc. The Ninth Circuit denied the Petitions on July 1, 1992 and amended its opinion to provide that its decision does not foreclose any claims for immunity from liability that can be raised by any party to the amended Complaint. Peggy McMartin Buckey v. County of Los Angeles, No. 90-56333,

---

[1] Within the context of this petition, Petitioner will use the terms "malicious prosecution" and "malicious prosecution action" to refer to a criminal prosecution which has allegedly been instigated in the absence of probable cause and for improper motives.

slip. op. at 7819 (9th Cir. July 1, 1992) (Appendix B). The court again did not address the collateral estoppel issue. The court stated:

> Under the putative claim, Buckey, like the plaintiff in Bretz v. Kelman, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc), would assert that the defendants, for their various reasons, conspired to attempt to send her to jail for child molestation, in the course of which great injury was suffered by her. The claim would not be that Buckey did not receive adequate procedural protections. Rather, as pointed out earlier, the claim would be that the procedures that ultimately established Buckey's innocence were made necessary only because of a wrongful conspiracy of entities and persons acting under the color of state law. The focus would be on a denial of equal protection of the laws, a wrong quite familiar

> to those in Congress who in 1866 enacted the first civil rights act and promulgated the Fourteenth Amendment.

slip. op. at 7823-34 (footnote omitted).

Petitioners respectfully request this court grant this petition for writ of certiorari to determine the important, unresolved issue of whether pure malicious prosecution can be the basis of a 42 U.S.C. § 1983 action. Further, if such a claim is cognizable, this Court should determine whether a § 1983 malicious prosecution action based upon a denial of equal protection can be maintained absent discrimination against a member of a protected class. Moreover, this petition should be granted to determine whether a judicial determination of probable cause to believe the plaintiff committed the crimes for which she was prosecuted

collaterally estops the plaintiff from proceeding on such a claim.

ARGUMENT

I. A MERE ALLEGATION OF A WRONGFUL CONSPIRACY TO MALICIOUSLY PROSECUTE WHICH RESULTS IN INJURY TO PLAINTIFF DOES NOT CONSTITUTE A CONSTITUTIONAL VIOLATION FOR PURPOSES OF 42 U.S.C. § 1983

Under 42 U.S.C. § 1983, liability may be imposed on a defendant who acts under color of law to subject another "to the deprivation of any right, privileges, or immunities secured by the Constitution and laws." "The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'" Baker v.

McCollan, 443 U.S. 137, 140, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433 (1979).

The opinion of the Ninth Circuit in the instant case, Peggy Buckey v. County of Los Angeles, et. al., No. 90-56333, slip op. 1601 (9th Cir. February 19, 1992), as amended and reh'g denied, slip op. 7817 (9th Cir. July 1, 1992), states that plaintiff can maintain an action brought pursuant to § 1983 if the complaint alleges a conspiracy to "subject Buckey to the hardships and injuries which she suffered". slip op. at 7823.

The Ninth Circuit acknowledges that there were no procedural due process violations in the criminal proceedings. slip op. at 7824. Rather, without any concrete analysis, the court relies upon a substantive due process/equal

protection theory which assumes the existence of a constitutional violation based solely on the extent of the alleged injury suffered by the plaintiff.

This approach is unworkable because the court fails to set forth guidelines to determine how egregious the alleged injury must be to rise to the level of a "substantive due process violation." Indeed, without any such guidelines, the Ninth Circuit elevates a state cause of action for malicious prosecution to the level of a constitutional violation for § 1983 purposes. Under the Buckey opinion, pure malicious prosecution is actionable under § 1983.

The practical effect of the decision is to sanction a cause of action under § 1983 for every criminal

defendant who is acquitted because virtually every criminal defendant who has undergone the rigors of a criminal trial can allege a conspiracy to falsely convict and resulting injury.

The decision conflicts with this Court's holding that the Fourteenth Amendment does not protect against all deprivations of liberty. Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). The Fourteenth Amendment only protects against deprivations of liberty accomplished without due process of law. In Baker, this Court stated:

> The Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted -- indeed for every suspect released. Nor are the manifold procedural protections afforded criminal defendants under the Bill of

> Rights 'without limits.' Patterson v. New York, 432 U.S. 197, 208, 97 S.Ct. 2319, 2326, 53 L.Ed.2d 281 (1977). 'Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.'

Id. at 145.

This Court has never resolved the issue of whether pure malicious prosecution can be the basis for a cognizable claim under 42 U.S.C. § 1983. This Court recently denied certiorari in a case which, in part, questioned whether 42 U.S.C. § 1983 provides a cause of action for malicious prosecution. Campbell v. Brummett, ___ U.S. ___, 112 S.Ct. 2323, 119 L.Ed.2d 241 (1992) (White, J., dissenting). Several years ago, this Court rejected another opportunity to address this issue. Cerbone v. Conway, 479 U.S. 84,

107 S.Ct. 390, 93 L.Ed.2d 325 (1986), writ dismissed as improvidently granted.

Absent a decision by this Court, the lower courts will continue to apply varying rules and standards to resolve the issue. The additional issues raised in the instant case present compelling reasons to grant certiorari. The opinion creates an unworkable equal protection-substantive due process theory to support plaintiff's § 1983 malicious prosecution claim and overlooks the estoppel effect of a prior judicial determination of probable cause.

A. THE NINTH CIRCUIT'S SUBSTANTIVE DUE PROCESS APPROACH IS UNWORKABLE AND CONFLICTS WITH THE OPINIONS OF OTHER CIRCUITS

On the issue of whether malicious prosecution can form the basis for a claim pursuant to § 1983, there is "clear disagreement among the Court of Appeals". Campbell v. Brummett, ___ U.S. ___, 112 S.Ct. 2323, 2323, 119 L.Ed.2d 241 (1992) (White, J., dissenting). Not only has the Court of Appeals reached conflicting opinions, individual Circuits have not reached a uniform approach within the specific Circuit to address this issue. Thus, a

definitive resolution is required by this court.

The Third Circuit permits a malicious prosecution action under § 1983 if the plaintiff alleges the state common law elements which include an actual malice requirement. Rose v. Bartle, 871 F.2d 331 (3d. Cir. 1989); Lee v. Mihalich, 847 F.2d 66 (3d. Cir. 1988). The common law elements do not include a constitutional violation. However, this approach was rejected by the Seventh Circuit which noted "the common law tort of malicious prosecution does not give rise to a federal constitutional wrong remedied by 42 U.S.C. § 1983". Friedman v. Village of Skokie, 763 F.2d 236, 239 (7th Cir. 1985).

Another approach, used by the Fourth Circuit, is that the denial of procedural due process is sufficient to maintain a cause of action under § 1983. Goodwin v. Metts, 885 F.2d 157 (4th Cir. 1989), cert. denied, 494 U.S. 1081, 110 S.Ct. 1812, 108 L.Ed.2d 942 (1990).

The First Circuit pointed out that:

> The majority of courts require the federal plaintiff to prove the elements of malicious prosecution under state law, but also hold that only when the misuse of the legal proceedings is so egregious as to subject the individual to a deprivation of a constitutional dimension does Section 1983 provide a remedy.

Torres v. Superintendent of the Police of Puerto Rico, 893 F.2d 404, 409 (1st Cir. 1990) (citations omitted). The Torres court adopted the majority rule and held that to state a cognizable claim under § 1983, "the complaint must

assert that the malicious conduct was so egregious that it violated substantive or procedural due process rights under the Fourteenth Amendment." Id. at 409.

The Fifth Circuit recently acknowledged that it and other circuits had "flip-flopped" on whether malicious prosecution is actionable under § 1983.

> Our most recent cases have assumed that malicious prosecution violates § 1983. Not long ago, however, our court had held that torts of abuse of process (of which malicious prosecution is a branch) were not encompassed within § 1983. Mysteriously, other circuit courts seem also to have flip-flopped on the constitutional tort status of malicious prosecution . . . [t]he Supreme Court may have to decide the issue someday.

Brummett v. Camble, 946 F.2d 1178, 1180-81, n.2 (5th Cir. 1991) (citations omitted), cert denied, ___ U.S. ___, 112 S.Ct. 2323, 119 L.Ed.2d 241 (1992).

The "general rule" in the Ninth Circuit is that a malicious prosecution claim is not cognizable under 42 U.S.C. § 1983. Usher v. City of Los Angeles, 828 F.2d 556, 562 (9th Cir. 1987). The exception to this rule is that a claim is cognizable if the prosecution is conducted with the intent to deny a person equal protection or other enumerated constitutional rights. Id. at 561-62.

Even in those Circuits which require a substantive or procedural due process violation, there is no agreement as to what constitutes "egregious" or "conscience-shocking" behavior such that a violation of a constitutional dimension has been established. See Torres, 893 F.2d at 410 ("misuse of the legal process alone will not be enough

to sustain a claim"); Barnier v. Szentmiklosi, 810 F.2d 594 (6th Cir. 1987) (police officers' filing of an unwarranted assault and battery charge against plaintiff was not "conscience-shocking"); Lorch v. Borough of Parkesburg, Pa., 736 F.2d 903 (3d Cir. 1984) (malicious filing of charges in attempt to suppress plaintiff's First Amendment right to make comment concerning public officials duties was not actionable); Gunderson v. Schlueter, 904 F.2d 407, 410-11 (8th Cir. 1990) (court indicated it came close but did not find a constitutional violation in a case where the defendant created and initiated the crime and the plaintiff fell into the government's entrapment scheme).

The Court of Appeals has failed to establish a uniform approach to address malicious prosecution-based § 1983 claims. This issue is of utmost concern to law enforcement and prosecutors to guide their actions in their investigations and prosecutions of criminal suspects.

II. THE NINTH CIRCUIT'S ERRONEOUS DECISION THAT PLAINTIFF COULD SUSTAIN A CLAIM PURSUANT TO § 1983 BASED ON A CONSPIRACY TO DEPRIVE PLAINTIFF OF HER EQUAL PROTECTION RIGHTS ABSENT A DISCRIMINATORY CLASSIFICATION IS IN CONFLICT WITH OTHER CIRCUITS AND THIS COURT

The Ninth Circuit found plaintiff could state a cognizable § 1983 claim if she alleged a conspiracy between the

defendants to send her to jail which resulted in injury. slip op. at 7823-24. The court then stated that "[t]he focus would be on the denial of equal protection of the laws . . .." slip op. at 7824.

The opinion never states that Buckey would have to allege intentional discrimination against her based on membership in a protected class and Buckey has never made such an allegation. To the extent the opinion appears to create an equal protection-based malicious prosecution cause of action under § 1983 without the necessity of alleging intentional discrimination against a member of a protected class, it conflicts with opinions of other circuits, other Ninth Circuit opinions and this Court's

opinion in Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

"Equal protection doctrine arose from the Fourteenth Amendment, whose original purpose was to protect black Americans from the reigning system of Jim Crow. Consequently, equal protection doctrine most strongly protects identifiable racial and ethnic groups from legislative and administrative classifications based on race or ethnicity." Hynson v. City of Chester Legal Dept., 864 F.2d 1026, 1029 (3d Cir. 1988)

Equal protection usually is recognized as a basis for a § 1983 claim in circumstances involving racial discrimination. See Phelps v. Witchita Eagle-Beacon, 886 F.2d 1262, 1269 (10th

Cir. 1989); Harris v. Harvey, 605 F.2d 330, 338 (7th Cir. 1979), cert. denied, 445 U.S. 938, 100 S.Ct. 1331, 63 L.Ed. 2d 772 (1980). "To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of a membership in a protected class." Henry v. Metropolitan Sewer Dist., 922 F.2d 332, 341 (6th Cir. 1990) (quoting Johnson v. Morel, 876 F.2d 477, 479 (5th Cir. 1989) (en banc)).

Under a companion statute, 42 U.S.C. § 1985(3), this Court held that to claim a violation of the right to equal protection, plaintiff must allege the unconstitutional act was motivated by some racial or class-based, invidious, discriminatory animus.

Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

Prior Ninth Circuit decisions which have used an equal protection analysis to support malicious prosecution type claims brought under § 1983 involve racial or other invidious discrimination. Usher v. City of Los Angeles, 828 F.2d 556, 562 (9th Cir. 1987) (plaintiff's allegation that the officers used racial slurs demonstrated the necessary racial animus); Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 624 (9th Cir. 1988) (actions taken by the defendants were allegedly motivated by plaintiff's "national origin, religion, race and political views.")

The "central purpose" behind the Fourteenth Amendment's equal protection clause is to prevent racial discrimination by government officials. Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). The Buckey opinion opens the door to heretofore unrecognized equal protection claims with no guidance or limitation.

III. THE NINTH CIRCUIT'S FAILURE TO RECOGNIZE THAT PLAINTIFF'S CLAIM IS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL IS ERRONEOUS AND DIRECTLY CONFLICTS WITH THIS COURT'S AND OTHER CIRCUIT'S DECISIONS

Even if this Court accepts the Ninth Circuit's substantive due process/equal protection approach to

malicious prosecution actions brought under § 1983, the putative claim is barred by the state court's determination of probable cause.

The Ninth Circuit described the respondent's putative claim as follows:

> Under the putative claim, Buckey, like the plaintiff in Bretz v. Kelman, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc), would assert that the defendants, for their various reasons, conspired to attempt to send her to jail for child molestation, in the course of which great injury was suffered by her.

slip op. at 1607 and 7823-24 (footnote omitted).[2] The language of the court

---

[2] Two cases cited by the Ninth Circuit in support of the putative claim do not involve circumstances where the defendant has alleged that the plaintiff is collaterally estopped from proceeding on his claim. Mann v. City of Tucson, Dept. of Police, 782 F.2d 790, 798 (9th Cir. 1986); Bretz v. Kelman, 773 F.2d 1026, 1031

demonstrates the putative claim would be for a wrongfully motivated criminal prosecution resulting in injury to the plaintiff, i.e., a claim for malicious prosecution.

There must be a clear lack of probable cause to support a violation of substantive due process in a malicious prosecution case. Carey v. City of Fall River, 870 F.2d 40, 40 (1st Cir. 1989); Franco-DeJerez v. Burgos, 876 F.2d 1038, 1040 (1st Cir. 1989) (no violation of the Constitution occurs where the defendant has probable case to believe the plaintiff committed a crime).

(9th Cir. 1985) (en banc). Both of these cases deal primarily with an analysis of Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), which is irrelevant to the collateral estoppel issue.

"The proper inquiry in a section 1983 claim based on false arrest or misuse of the criminal process is not whether the person arrested in fact committed the offense but whether the arresting officers had probable cause to believe the person arrested had committed the offense." Dowling v. City of Philadelphia, 855 F.2d 136, 141 (3d Cir. 1988) (emphasis added).[3]

Even circuits which find that a malicious prosecution claim is cognizable under § 1983 but do not

---

[3] The Ninth Circuit's confusion on this issue is revealed by its erroneous assertion that the criminal procedure "ultimately established Buckey's innocence." slip op. at 7824. The criminal trial did not establish Buckey's innocence. The most that can be said is that the prosecution failed to establish her guilt beyond a reasonable doubt.

utilize the state elements to define that action, require an absence of probable cause to state a cognizable claim. Singleton v. City of New York, 632 F.2d 185, 195 (2d Cir. 1980), cert. denied, 450 U.S. 920, 101 S.Ct. 1368, 67 L.Ed.2d 347 (1981).

The Ninth Circuit has held that to state a cognizable § 1983 claim, a plaintiff must allege the elements of malicious prosecution under California law, including "lack of probable cause"[4] and that the "malicious prosecution is conducted with the intent to deprive a person of equal protection of the laws or is otherwise intended to subject a

---

[4] Under California law, the absence of probable cause is an essential element of a cause of action for malicious prosecution. Bulkley v. Cline (1962) 206 Cal.App.2d 742, 748.

person to a denial of constitutional rights." See Usher v. City of Los Angeles, 828 F.2d 556, 562 (9th Cir. 1987).

The Buckey opinion directly conflicts with this Court's mandate that state court judgments are to be given preclusive effect in actions brought under 42 U.S.C. § 1983. Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 441, 66 L.Ed.2d 308, (1980). In Allen, this Court held that where a party has a full and fair opportunity to litigate an issue in a state court proceeding, the judgment rendered in that proceeding is binding against him in a later action brought under § 1983. Id. at 101.

Under California law, the purpose of a preliminary hearing is to determine whether probable cause exists to support

the prosecution and to "weed out" "unwarranted prosecutions" which are inspired by malicious motives. Jaffe v. Stone, 18 Cal.2d 146, 150, 114 P.2d 335 (1941).

In Buckey, the Ninth Circuit acknowledged the fairness of the preliminary hearing which lasted over eighteen months and involved examination and cross-examination of numerous witnesses. "The preliminary hearing and the trial itself cannot be faulted from a procedural point of view." slip op. at 7824. Consequently, plaintiff was given a full and fair opportunity to litigate the issue of probable cause.

The preclusive effect of preliminary hearing probable cause determinations on § 1983 malicious prosecution actions has been addressed

by the Sixth and Seventh Circuits in Coogan v. City of Wixom, 820 F.2d 170 (6th Cir. 1987) and Guenther v. Holmgreen, 738 F.2d 879 (7th Cir. 1984), cert. denied, 469 U.S. 1212, 105 S.Ct. 1182, 84 L.Ed.2d 329 (1985).

In Guenther, an acquitted criminal defendant brought suit under 42 U.S.C. § 1983 against a police officer and his city employer alleging the officer arrested him without probable cause, violated his Fourth Amendment rights and deprived him of his liberty without due process of law under the Fourteenth Amendment.

The state criminal court previously determined there was probable cause to arrest and denied a motion to dismiss the criminal charges following the preliminary hearing.

The Seventh Circuit decided the plaintiff was precluded from proceeding on his substantive Fourth Amendment and due process claims and stated:

> In passing § 1983, '[Congress did not intend] to allow re-litigation after a full and fair hearing simply because the state court's decision may have been erroneous.' Allen v. McCurry, 449 U.S. at 101, 101 S.Ct. at 418. We should add that the state court's determination of probable cause estops Guenther from raising any Fourteenth Amendment due process claim based upon general tort theories of false arrest, false imprisonment, and malicious prosecution.

Guenther, 738 F.2d at 889 (emphasis added and footnote omitted).

The Sixth Circuit arrived at the same conclusion as the Guenther court on very similar facts. The state court's determination of probable cause collaterally estopped the criminal

defendant from proceeding on a claim brought under 42 U.S.C. § 1983 based upon a general theory of malicious prosecution. Coogan v. City of Wixom, 820 F.2d 170, 175 (6th Cir. 1987).

The claim proposed by the Buckey opinion as potentially cognizable under § 1983 is grounded in malicious prosecution. The absence of probable cause is a necessary element of that putative claim. The state court has already determined that probable cause existed for the prosecution. Thus, plaintiff is barred from proceeding on even the putative claim. See Allen v. McCurry, supra, 449 U.S. at 101.

The putative claim created by the Ninth Circuit conflicts with this court's decisions, other circuit court opinions, and good public policy which

promotes finality of judgments, comity and preservation of scarce judicial resources.

CONCLUSION

Based on the foregoing, Petitioners, City of Manhattan Beach, County of Los Angeles, and Robert Philibosian respectfully request this Court issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment in the instant case.

Respectfully Submitted,

FRANSCELL, STRICKLAND,
ROBERTS & LAWRENCE
DAVID DUANE LAWRENCE,
COUNSEL OF RECORD
CAROL D. JANSSEN
225 South Lake Avenue
Penthouse
Pasadena, California 91101
(818) 304-7830
Attorneys for Petitioner
CITY OF MANHATTAN BEACH

DEWITT W. CLINTON
COUNTY COUNSEL
ROGER H. GRANBO
OFFICE OF THE COUNTY COUNSEL
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012
(213) 974-1900
Attorneys for Petitioners COUNTY OF LOS ANGELES and ROBERT PHILIBOSIAN

JOHN A. DALY
CHASE, ROTCHFORD, DRUKKER & BOGUST
700 South Flower Street
Fifth Floor
Los Angeles, CA 90017
(213) 626-8711
Attorneys for Petitioners COUNTY OF LOS ANGELES and ROBERT PHILIBOSIAN

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PEGGY MCMARTIN BUCKEY,
Plaintiff-Appellant,

v.

COUNTY OF LOS ANGELES; CITY OF MANHATTAN BEACH; ROBERT PHILIBOSIAN; CHILDREN'S INSTITUTE INTERNATIONAL; WAYNE T. SATZ; CAPITAL CITIES/ABC, INC.; KATHLEEN "KEE" MACFARLANE,
Defendants-Appellees.

No. 90-56333
D.C. No.
CV-90-0293-RG
OPINION

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, Jr., District Judge, Presiding

Argued and Submitted
November 7, 1991—Pasadena, California

Filed February 19, 1992

Before: Joseph T. Sneed, Robert R. Beezer and
David R. Thompson, Circuit Judges.

Opinion by Judge Sneed

SUMMARY

Courts and Procedure

Reversing and remanding a district court judgment dismissing a section 1983 action with prejudice for failure to state a

claim, the court of appeals held that appellant should be permitted to amend her complaint to allege that due process was unconstitutionally denied regardless of the purity of the procedures themselves.

Appellant Peggy McMartin Buckey was acquitted of state charges in the highly publicized McMartin Preschool molestation case. She brought a section 1983 action against several individuals and entities, alleging that improper motives led them to pursue the case despite the lack of factual foundation for doing so. Her complaint stated that, without limitation, she was deprived of her rights to due process, privacy, equal protection, and a fair trial contrary to the fourteenth amendment. The district court granted the defendants' motion to dismiss for failure to state a claim. McMartin's complaint was dismissed with prejudice and with no leave to amend.

[1] The court acknowledged that, as it stood, McMartin's complaint could not survive a motion to dismiss. Thus, the issue the court confronted was whether it should remand to permit McMartin to amend her pleadings. [2] Here, there was a distinct claim cognizable in a federal court and consistent with the facts and allegations of McMartin's complaint that she might plead: That all parties described in the complaint conspired under the color of state law to subject her to the hardships and injuries that she suffered. [3] This putative claim would not be addressed to a deprivation under color of state law of procedural due process, but rather would assert that due process was unconstitutionally denied regardless of the purity of the procedures themselves. [4] To state a defamation-plus claim, McMartin must join a defamation claim to a recognizable section 1983 wrong such as the denial of equal protection and substantive due process.

COUNSEL

William H. Waysman, James H. Davis, Los Angeles, California, for the plaintiff-appellant.

Roger H. Granbo, Deputy County Counsel, Los Angeles, California, Jeffrey L. Garland, Cotkin, Collins & Franscell, Santa Ana, California, Charles P. Diamond, O'Melveny & Myers, Gregory J. Aldisert, Philip W. Boesch, Jr., Kinsella, Boesch, Fujikawa & Towle, Mark B. Helm, Munger, Tolles & Olson, Los Angeles, California, for the defendants-appellees.

OPINION

SNEED, Circuit Judge:

Peggy McMartin Buckey, acquitted in the highly publicized McMartin Preschool child molestation case, appeals the dismissal with prejudice of her 42 U.S.C. § 1983 action against the City of Manhattan Beach, Los Angeles County, Robert Philibosian, Los Angeles County District Attorney, Children's Institute International (CII), child abuse investigation specialists, Kathleen "Kee" MacFarlane, CII investigative social worker, television company Capital Cities/ABC, Inc., and ABC reporter Wayne T. Satz. Buckey alleges, in effect, that but for the policies and actions of the defendants, her life would not have been ruined by the McMartin Preschool prosecution. The trial court found that there was no possible theory under which Buckey's allegations could amount to a cognizable claim. We reverse and remand to allow Buckey to amend her pleadings.

I.

FACTS AND PROCEEDINGS BELOW

The facts, as set forth in Buckey's complaint, are as follows: Buckey co-owned and taught at the highly regarded Virginia McMartin Preschool in Manhattan Beach, California. In 1983, a person known to be paranoid and otherwise mentally ill alleged to the Manhattan Beach police that her child

had been sexually molested while attending the McMartin Preschool. The police sent letters to all McMartin Preschool parents, which resulted in a wave of unfounded abuse allegations. The ensuing city and county investigation was improperly delegated to CII, with Kee MacFarlane as principal investigator. MacFarlane had no relevant academic, professional, or technical licenses or credentials. CII and MacFarlane proceeded seriously to mishandle the investigation, so as to violate established guidelines for child abuse investigation and to cause the children to fabricate testimony and fantasize experiences of abuse that had never occurred. The County, acting through Philibosian, accepted the CII investigation as basis for launching a prosecution against Buckey and others. Meanwhile, MacFarlane leaked the story to Satz at ABC, where it was disseminated to the public.

Buckey alleges that several defendants had improper motives that led them to pursue the McMartin case despite the lack of factual foundation for doing so. CII needed to unearth a scandal to save its business from bankruptcy. Philibosian needed ammunition for an upcoming election battle. Capital Cities/ABC wanted to sell a sensational story, and was willing to go beyond the bounds of responsible journalism to do so.[1] In other words, Capital Cities/ABC created rather than simply reported the news.

After her acquittal on all criminal charges, Buckey brought this action in federal district court. She alleged section 1983 violations and pendent state law claims, and sought upwards of $1 million in damages. Her complaint stated that, without limitation, she was deprived of her rights to due process, privacy, equal protection, and a fair trial contrary to the Fourteenth Amendment. The defendants moved to dismiss under

[1]Buckey's complaint alleges a conspiracy among the City, County, CII, MacFarlane, Satz, and ABC to disclose the McMartin affair prior to Buckey's indictment. A romantic liaison between MacFarlane and Satz is asserted in Buckey's appellate brief, but not in her complaint.

Fed. R. Civ. P. Rule 12(b)(6) for failure to state a claim.[2] The trial court observed that the preliminary hearing that led to Buckey's being bound over for criminal trial had lasted 18 months. This indicated that the prosecution had probable cause for proceeding with the McMartin criminal case. The court further noted that Buckey had been acquitted, and so could not complain she had not received a fair trial. Finally, the court expressed its sympathy that Buckey was properly "very, very upset" by what had happened to her, but stated that "being very, very upset does not state a cause of action under [section] 1983." The court dismissed Buckey's section 1983 action with prejudice, denying leave to amend, and dismissed the pendent state law claims without prejudice.

II.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291. A dismissal for failure to state a claim is a ruling on a question of law and as such is reviewed de novo. *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990). Review is based on the contents of the complaint. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Id.* (quotation omitted). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Id.* Civil rights complaints are to be liberally construed. *Gobel v. Maricopa County*, 867 F.2d 1201, 1203 (9th Cir. 1989).

[2]Defendant Satz did not appear at the hearing on the motions to dismiss. By stipulation of the parties, the motions to dismiss apply with the same force and effect as to Satz as to the other defendants.

III.

ANALYSIS

[1] Buckey's vague and conclusory complaint "aims in the general direction of the federal Constitution with buckshot." *Chiplin Enter. v. City of Lebanon*, 712 F.2d 1524, 1526 (1st Cir. 1983). It describes her misfortunes and the persons she believed caused them, but in no way does Buckey adequately plead injuries cognizable under section 1983. Mere negligence and self-aggrandizing motives are not actionable under section 1983. *Daniels v. Williams*, 474 U.S. 327, 333 (1986); *see, e.g., Johnson v. Barker*, 799 F.2d 1396, 1400 (9th Cir. 1986) (alleged politically motivated prosecution did not give rise to valid 1983 due process claim). Nor does the complaint allege specific facts to support the existence of a conspiracy among the defendants. *See Burns v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989). As it stands, Buckey's complaint cannot survive a motion to dismiss. The only issue we confront is whether we should remand to permit Buckey to amend her pleadings.

[2] We would be justified in doing this only if there is a distinct claim cognizable in a federal court and consistent with the facts and allegations set forth in her complaint that she might plead. We believe one such claim may exist. It is that all the parties described in the complaint conspired under the color of state law to subject Buckey to the hardships and injuries which she suffered. We express no opinion on whether such a claim ethically and professionally can be filed. We only indicate that it is a possibility.

[3] This putative claim would not be addressed to a deprivation under color of state law of procedural due process, but rather would assert that due process was unconstitutionally denied "regardless of the purity of the procedures themselves." *Mann v. City of Tucson, Dept. of Police*, 782 F.2d 790, 798 (9th Cir. 1986) (Sneed, J., concurring in the

result). Because the claim would not be based in procedural due process, the question of the adequacy of post-deprivation remedies, so important in section 1983 cases involving only procedural due process deprivations, would be irrelevant. *Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990); *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 957 (9th Cir. 1991).

Under the putative claim, Buckey, like the plaintiff in *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc),[3] would assert that the defendants, for their various reasons, conspired to attempt to send her to jail for child molestation, in the course of which great injury was suffered by her. The claim would not be that Buckey did not receive adequate procedural protections. Rather, as pointed out earlier, the claim would be that the procedures that ultimately established Buckey's innocence were made necessary only because of a wrongful conspiracy of entities and persons acting under the color of state law. The focus would be on a denial of equal protection of the laws, a wrong quite familiar to those in Congress who in 1866 enacted the first civil rights act and promulgated the Fourteenth Amendment. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 211 (1866) (describing civil rights bill S. 61: "the inhabitants of every race and color . . . shall have . . . full and equal benefit of all laws *and proceedings* for the security of persons and property, and shall be subject *to like punishment, pains, and penalties, and to none other* . . . .") (emphasis added). .

Buckey, to repeat, was afforded ample due process at the state level. She received its full benefits resulting in her

[3]The court's analysis in *Bretz* is to some extent framed in the language of procedural due process, *see id.*, and the case has been interpreted as a procedural due process case, *see, e.g., Johnson v. Barker*, 799 F.2d at 1400. However, *Bretz* was decided without the benefit of *Zinermon*'s three-prong typology of 1983 due process claims, 494 U.S. at 125-26, and it is most properly analyzed as a case involving the denial of equal protection or substantive due process.

acquittal. The preliminary hearing and the trial itself cannot be faulted from a procedural point of view.

[4] Nor can Buckey successfully urge that she suffered injury because of so-called "defamation plus" by those acting under color of state law. *See Paul v. Davis*, 424 U.S. 693 (1976). Business and reputation losses alone do not constitute the "plus" that is required to transform an ordinary defamation claim into a section 1983 claim. *Cooper v. Dupnik*, 924 F.2d 1520, 1534 (9th Cir. 1991), *reh'g en banc ordered*, 933 F.2d 798 (May 23, 1991). To state a defamation-plus claim, Buckey must join a defamation claim to a recognizable section 1983 wrong such as the denial of equal protection and substantive due process here hypothesized.

We conclude that Buckey should be given the opportunity to amend her complaint.

REVERSED and REMANDED.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PEGGY MCMARTIN BUCKEY,
Plaintiff-Appellant,

v.

COUNTY OF LOS ANGELES; CITY OF MANHATTAN BEACH; ROBERT PHILOBOSIAN; CHILDREN'S INSTITUTE INTERNATIONAL; WAYNE T. SATZ; CAPITAL CITIES/ABC, INC.; KATHLEEN "KEE" MACFARLANE,
Defendants-Appellees.

No. 90-56333

D.C. No. CV-90-0293-RG

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, Jr., District Judge, Presiding

Argued and Submitted
November 7, 1991—Pasadena, California

Filed February 19, 1992
Amended July 1, 1992

Before: Joseph T. Sneed, Robert R. Beezer, and David R. Thompson, Circuit Judges.

Opinion by Judge Sneed

SUMMARY

Courts and Procedure

Reversing and remanding a district court judgment dismissing a section 1983 action with prejudice for failure to state a

claim, the court of appeals held that appellant should be permitted to amend her complaint to allege that due process was unconstitutionally denied regardless of the purity of the procedures themselves.

Appellant Peggy McMartin Buckey was acquitted of state charges in the highly publicized McMartin Preschool molestation case. She brought a section 1983 action against several individuals and entities, alleging that improper motives led them to pursue the case despite the lack of factual foundation for doing so. Her complaint stated that, without limitation, she was deprived of her rights to due process, privacy, equal protection, and a fair trial contrary to the fourteenth amendment. The district court granted the defendants' motion to dismiss for failure to state a claim. McMartin's complaint was dismissed with prejudice and with no leave to amend.

[1] The court acknowledged that, as it stood, McMartin's complaint could not survive a motion to dismiss. Thus, the issue the court confronted was whether it should remand to permit McMartin to amend her pleadings. [2] Here, there was a distinct claim cognizable in a federal court and consistent with the facts and allegations of McMartin's complaint that she might plead: That all parties described in the complaint conspired under the color of state law to subject her to the hardships and injuries that she suffered. [3] This putative claim would not be addressed to a deprivation under color of state law of procedural due process, but rather would assert that due process was unconstitutionally denied regardless of the purity of the procedures themselves. [4] To state a defamation-plus claim, McMartin must join a defamation claim to a recognizable section 1983 wrong such as the denial of equal protection and substantive due process.

COUNSEL

William H. Waysman, James H. Davis, Los Angeles, California, for the plaintiff-appellant.

Roger H. Granbo, Deputy County Counsel, Los Angeles, California, Jeffrey L. Garland, Cotkin, Collins & Franscell, Santa Ana, California, Charles P. Diamond, O'Melveny & Meyers, Gregory J. Aldisert, Philip W. Boesch, Jr., Kinsella, Boesch, Fujikawa & Towle, Mark B. Helm, Munger, Tolles & Olson, Los Angeles, California, for the defendants-appellees.

ORDER

The panel has voted to amend its opinion filed February 19, 1992, as follows:

1. In the first full paragraph on page 1608 of the slip opinion, which paragraph begins, "Nor can Buckey successfully urge . . . ," the citation "*Cooper v. Dupnik*, 924 F.2d 1520, 1534 (9th Cir. 1991), *reh'g en banc ordered*, 933 F.2d 798 (May 23, 1991)" should be changed to "*Cooper v. Dupnik*, 924 F.2d 1520, 1534 (9th Cir. 1991), *rev'd on other grounds*, Nos. 88-15661, 88-15685, slip op. at 5043 (9th Cir. May 5, 1992) (en banc)."

2. At the end of the second full paragraph on page 1608 of the slip opinion, which paragraph begins, "We conclude . . . ," add the following sentence: "Nothing in this opinion is intended to foreclose any claim of immunity from liability under section 1983 that can be raised by any party to the amended complaint of the appellant."

With the opinion so amended, the panel as constituted in the above case has voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc. The full court was advised of the suggestions for en banc rehearing, and no judge of the court requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied, and the suggestions for rehearing en banc are rejected.

OPINION

SNEED, Circuit Judge:

Peggy McMartin Buckey, acquitted in the highly publicized McMartin Preschool child molestation case, appeals the dismissal with prejudice of her 42 U.S.C. § 1983 action against the City of Manhattan Beach, Los Angeles County, Robert Philibosian, Los Angeles County District Attorney, Children's Institute International (CII), child abuse investigation specialists, Kathleen "Kee" MacFarlane, CII investigative social worker, television company Capital Cities/ABC, Inc., and ABC reporter Wayne T. Satz. Buckey alleges, in effect, that but for the policies and actions of the defendants, her life would not have been ruined by the McMartin Preschool prosecution. The trial court found that there was no possible theory under which Buckey's allegations could amount to a cognizable claim. We reverse and remand to allow Buckey to amend her pleadings.

I.

FACTS AND PROCEEDINGS BELOW

The facts, as set forth in Buckey's complaint, are as follows: Buckey co-owned and taught at the highly regarded Virginia McMartin Preschool in Manhattan Beach, California. In 1983, a person known to be paranoid and otherwise mentally ill alleged to the Manhattan Beach police that her child had been sexually molested while attending the McMartin Preschool. The police sent letters to all McMartin Preschool parents, which resulted in a wave of unfounded abuse allegations. The ensuing city and county investigation was improperly delegated to CII, with Kee MacFarlane as principal investigator. MacFarlane had no relevant academic, professional, or technical licenses or credentials. CII and MacFarlane proceeded seriously to mishandle the investigation, so as to violate established guidelines for child abuse investigation

and to cause the children to fabricate testimony and fantasize experiences of abuse that had never occurred. The County, acting through Philibosian, accepted the CII investigation as basis for launching a prosecution against Buckey and others. Meanwhile, MacFarlane leaked the story to Satz at ABC, where it was disseminated to the public.

Buckey alleges that several defendants had improper motives that led them to pursue the McMartin case despite the lack of factual foundation for doing so. CII needed to unearth a scandal to save its business from bankruptcy. Philibosian needed ammunition for an upcoming election battle. Capital Cities/ABC wanted to sell a sensational story, and was willing to go beyond the bounds of responsible journalism to do so.[1] In other words, Capital Cities/ABC created rather than simply reported the news.

After her acquittal on all criminal charges, Buckey brought this action in federal district court. She alleged section 1983 violations and pendent state law claims, and sought upwards of $1 million in damages. Her complaint stated that, without limitation, she was deprived of her rights to due process, privacy, equal protection, and a fair trial contrary to the Fourteenth Amendment. The defendants moved to dismiss under Fed. R. Civ. P. Rule 12(b)(6) for failure to state a claim.[2] The trial court observed that the preliminary hearing that led to Buckey's being bound over for criminal trial had lasted 18 months. This indicated that the prosecution had probable cause for proceeding with the McMartin criminal case. The court further noted that Buckey had been acquitted, and so

[1]Buckey's complaint alleges a conspiracy among the City, County, CII, MacFarlane, Satz, and ABC to disclose the McMartin affair prior to Buckey's indictment. A romantic liaison between MacFarlane and Satz is asserted in Buckey's appellate brief, but not in her complaint.

[2]Defendant Satz did not appear at the hearing on the motions to dismiss. By stipulation of the parties, the motions to dismiss apply with the same force and effect as to Satz as to the other defendants.

could not complain she had not received a fair trial. Finally, the court expressed its sympathy that Buckey was properly "very, very upset" by what had happened to her, but stated that "being very, very upset does not state a cause of action under [section] 1983." The court dismissed Buckey's section 1983 action with prejudice, denying leave to amend, and dismissed the pendent state law claims without prejudice.

II.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291. A dismissal for failure to state a claim is a ruling on a question of law and as such is reviewed de novo. *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990). Review is based on the contents of the complaint. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Id.* (quotation omitted). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Id.* Civil rights complaints are to be liberally construed. *Gobel v. Maricopa County*, 867 F.2d 1201, 1203 (9th Cir. 1989).

III.

ANALYSIS

[1] Buckey's vague and conclusory complaint "aims in the general direction of the federal Constitution with buckshot." *Chiplin Enter. v. City of Lebanon*, 712 F.2d 1524, 1526 (1st Cir. 1983). It describes her misfortunes and the persons she believed caused them, but in no way does Buckey adequately plead injuries cognizable under section 1983. Mere negligence and self-aggrandizing motives are not actionable under

section 1983. *Daniels v. Williams*, 474 U.S. 327, 333 (1986); *see, e.g., Johnson v. Barker*, 799 F.2d 1396, 1400 (9th Cir. 1986) (alleged politically motivated prosecution did not give rise to valid 1983 due process claim). Nor does the complaint allege specific facts to support the existence of a conspiracy among the defendants. *See Burns v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989). As it stands, Buckey's complaint cannot survive a motion to dismiss. The only issue we confront is whether we should remand to permit Buckey to amend her pleadings.

[2] We would be justified in doing this only if there is a distinct claim cognizable in a federal court and consistent with the facts and allegations set forth in her complaint that she might plead. We believe one such claim may exist. It is that all the parties described in the complaint conspired under the color of state law to subject Buckey to the hardships and injuries which she suffered. We express no opinion on whether such a claim ethically and professionally can be filed. We only indicate that it is a possibility.

[3] This putative claim would not be addressed to a deprivation under color of state law of procedural due process, but rather would assert that due process was unconstitutionally denied "regardless of the purity of the procedures themselves." *Mann v. City of Tucson, Dept. of Police*, 782 F.2d 790, 798 (9th Cir. 1986) (Sneed, J., concurring in the result). Because the claim would not be based in procedural due process, the question of the adequacy of post-deprivation remedies, so important in section 1983 cases involving only procedural due process deprivations, would be irrelevant. *Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990); *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 957 (9th Cir. 1991).

Under the putative claim, Buckey, like the plaintiff in *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc),[3]

[3]The court's analysis in *Bretz* is to some extent framed in the language of procedural due process, *see id.*, and the case has been interpreted as a

would assert that the defendants, for their various reasons, conspired to attempt to send her to jail for child molestation, in the course of which great injury was suffered by her. The claim would not be that Buckey did not receive adequate procedural protections. Rather, as pointed out earlier, the claim would be that the procedures that ultimately established Buckey's innocence were made necessary only because of a wrongful conspiracy of entities and persons acting under the color of state law. The focus would be on a denial of equal protection of the laws, a wrong quite familiar to those in Congress who in 1866 enacted the first civil rights act and promulgated the Fourteenth Amendment. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 211 (1866) (describing civil rights bill S. 61: "the inhabitants of every race and color . . . shall have . . . full and equal benefit of all laws *and proceedings* for the security of persons and property, and shall be subject *to like punishment, pains, and penalties, and to none other* . . . .") (emphasis added).

Buckey, to repeat, was afforded ample due process at the state level. She received its full benefits resulting in her acquittal. The preliminary hearing and the trial itself cannot be faulted from a procedural point of view.

[4] Nor can Buckey successfully urge that she suffered injury because of so-called "defamation plus" by those acting under color of state law. *See Paul v. Davis*, 424 U.S. 693 (1976). Business and reputation losses alone do not constitute the "plus" that is required to transform an ordinary defamation claim into a section 1983 claim. *Cooper v. Dupnik*, 924 F.2d 1520, 1534 (9th Cir. 1991), *rev'd on other grounds*, Nos.

---

procedural due process case, *see, e.g., Johnson v. Barker*, 799 F.2d at 1400. However, *Bretz* was decided without the benefit of *Zinermon*'s three-prong typology of 1983 due process claims, 494 U.S. at 125-26, and it is most properly analyzed as a case involving the denial of equal protection or substantive due process.

88-15661, 88-15685, slip op. at 5043 (9th Cir. May 5, 1992) (en banc). To state a defamation-plus claim, Buckey must join a defamation claim to a recognizable section 1983 wrong such as the denial of equal protection and substantive due process here hypothesized.

We conclude that Buckey should be given the opportunity to amend her complaint. Nothing in this opinion is intended to foreclose any claim of immunity from liability under section 1983 that can be raised by any party to the amended complaint of the appellant.

REVERSED and REMANDED.

APPENDIX C

DE WITT W. CLINTON,
County Counsel
S. ROBERT AMBROSE,
Assistant County Counsel
PATRICK T. MEYERS,
Principal Deputy County Counsel
ROGER H. GRANBO,
Deputy County Counsel
State Bar No. 108372
500 West Temple Street, Suite 653
Los Angeles,
California 90012
(213) 974-1930

JOHN A. DALY
CHASE, ROTCHFORD, DRUKKER and BOGUST
700 South Flower Street, Fifth Floor
Los Angeles, California 90017

Attorneys for Defendants
COUNTY OF LOS ANGELES and
ROBERT PHILIBOSIAN

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PEGGY McMARTIN BUCKEY,	)	CASE NO. CV 90 0293 RG (GHKx)
Plaintiff,	)	ORDER
v.	)	
COUNTY OF LOS ANGELES, CITY OF MANHATTAN BEACH, ROBERT PHILIBOSIAN, CHILDREN'S	)	

INSTITUTE)
INTERNATIONAL,)
KATHLEEN "KEE")
MAC FARLANE,)
CAPITAL CITIES/)
ABC, INC., and)
WAYNE T. SATZ,)
)
Defendants.)
_____)

On August 6, 1990, in Courtroom 16 in the above-entitled court, the Motions to Dismiss Plaintiff's Complaint pursuant to the Federal Rules of Civil Procedure, Rule 12(b)(6), filed by Defendant COUNTY OF LOS ANGELES and ROBERT PHILIBOSIAN, CITY OF MANHATTAN BEACH, CHILDREN'S INSTITUTE INTERNATIONAL and KATHLEEN "KEE" MAC FARLANE, and CAPITAL CITIES/ABC, INC., came on regularly for hearing.

Appearing for Plaintiff PEGGY McMARTIN BUCKEY was William H. Waysman. Appearing for Defendants COUNTY OF LOS ANGELES and ROBERT PHILIBOSIAN was De Witt W. Clinton, County Counsel, by

Roger H. Granbo, Deputy County Counsel, and John A. Daly of Chase, Rotchford, Drukker & Bogust. Appearing for Defendant CITY OF MANHATTAN BEACH was David D. Lawrence of Cotkin, Collins & Franscell. Appearing for Defendants CAPITAL CITIES/ABC, INC. was Bradley S. Phillips and Robert N. Treiman of Munger, Tolles and Olson. Appearing for Defendants CHILDREN'S INSTITUTE INTERNATIONAL and KATHLEEN "KEE" MAC FARLANE was Lisa M. Jacobsen of O'Melveny and Meyers. There were no other appearances.

After consideration of the moving papers, the oppositions thereto, the replies to the oppositions and oral argument of counsel, the Court orders as follows:

1. Plaintiff's claim for Violation of Civil Rights under 42 U.S.C. Section

1983 is dismissed with prejudice. The Plaintiff has not stated a claim, and there is no way that the Plaintiff can state a claim that her constitutionally protected rights were violated by any of the moving Defendants.

2. Plaintiff's state claims for Common Law Conspiracy, Malicious Prosecution, and Defamation are

dismissed without prejudice as there is no longer a federal claim to which they may be appended.

IT IS SO ORDERED.

DATED: 9/27/90

RICHARD A. GADBOIS, JR.
United States District Judge

FILED SEPTEMBER 27, 1990
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

I HEREBY CERTIFY THAT THIS DOCUMENTS WAS SERVED BY FIRST CLASS MAIL POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE.
DATED: 9/28/92

/s/
DEPUTY CLERK

APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 90-56333
CT/AG#: CV 90 0293 RG

PEGGY MCMARTIN BUCKEY,

Plaintiff-Appellant

v.

LOS ANGELES COUNTY SHERIFF; MANHATTAN BEACH CITY; ROBERT PHILIBOSIAN, CHILDREN'S INSTITUTE INTERNATIONAL; WAYNE T. SATZ; CAPITAL CITIES/ABC, INCORPORATED; KATHLEEN MACFARLANE, alias, Kee McFarlane,

Defendants-Appellees

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the

Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this cause be, and hereby is REVERSED and REMANDED.

Filed and entered July 1, 1992

A TRUE COPY
CATHY A CATTERSON
CLERK OF COURT
ATTEST
AUGUST 7, 1992
by: /s/

APPENDIX E

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1985(3):

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the

laws, or equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Fourteenth Amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.